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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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v.

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v.

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No. 143

SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY, *Petitioners,*

v.

PUBLIC SERVICE COMMISSION OF NEW YORK AND LONG ISLAND LIGHTING COMPANY, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR SHELL OIL COMPANY, SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., AND EDWIN M. JONES OIL COMPANY

QUESTIONS CONSIDERED

Only The Brooklyn Union Gas Company, *et al.*, referred to in our initial brief and herein as "Intervenors," attack the Commission's decision on the in-line price and "need" issues. We reply to questions 1 and 2 set out in their initial brief.[1]

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[1] These are the same questions presented in our initial brief stated in inverse order.

ARGUMENT

1. Temporarily Certificated Prices v. Uncontested Permanently Certificated Prices

The Intervenors seek to create the impression (Int. Br. p. 28) that there are prices which were permanently certificated *following a hearing* which the Commission could have relied on in Districts 2, 3, and 4, to determine the price line since September 28, 1960. We wish to make it unmistakably clear: *there are* NO *permanent certificates issued after a full hearing in Districts 2, 3, and 4 for contracts dated after September 28, 1960,* except those certificates issued by the Commission in the three cases here under review, together with the *Turnbull and Zoch* case affirmed by the Fifth Circuit in *Continental Oil Co.* v. *F.P.C.*, 378 F.2d 510 (5th Cir. 1967).[2]

The only permanent certificates in existence for contracts executed during this time period are those certificates issued under the abridged, or uncontested procedure, without hearing, as provided for by the Commission's Rules (18 CFR 1.32).[3]

Under the Commission's Rules, *the consideration given to the price* issue is identical in a temporary certificate case and in an uncontested permanent certificate case. The contract price is compared to the Commission's guideline price (or in-line price, if one

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[2] Certiorari pending in Cases No. 504, 520, 526, and 628.

[3] At page 14 of their brief, Intervenors criticize the Commission for giving weight to three sales at 18¢ which were permanently certificated under the abridged procedure. Intervenors fail to mention that *all* of the sales at lower prices, which *they* would rely on to fix the price line, were also certificated under the *same* abridged procedure.

has been determined). If the contract price is below the guideline price, a temporary certificate or an uncontested permanent certificate will be issued without condition reducing the initial price. If the contract price is above the guideline price, a price condition will be attached reducing the price to the guideline price in the temporary certificate.[4] The Commission will normally then write the producer a letter, stating that if the producer will accept a permanent certificate, with a condition reducing the price to the guideline price, such certificate will be issued under the abridged (uncontested) procedure.[5] In most cases the producer agrees, as it is unlikely that the Commission can be made to change its view even after a hearing, under the restrictions which the Commission places on the evidence which can be introduced. Upon being advised that the producer will accept such a conditioned certificate, the Commission, after giving public notice and affording the opportunity for interventions, will issue the certificate, if no interventions are filed under the abridged procedure.

What then is the essential difference in the Commission's procedure in an uncontested permanent certificate and in a temporary certificate? Only one thing —the filing of an intervention by a distributor company or a State Commission. If such interventions are filed, deliveries must be made under a *temporary* certificate until the contested proceeding is completed. If *no* intervention is filed, deliveries are made under a *permanent* certificate issued under the abridged procedure.

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[4] See footnote no. 2 on page 6 of Commission's Brief.

[5] See, *e.g.*, the letters to the Hunt interests in Dockets CI61-1282 and CI61-1283, consolidated in *Hawkins*, at 25 FPC 654-655.

The argument made by the Intervenors on the in-line issue may then be reduced to this: "If we decide to contest a price, the Commission cannot use it in its in-line determination; but if we decide (because the price is below *our* selected level) not to contest the price, the Commission must not only use this price, but *cannot look to anything else* to determine the price line." This is simply an attempt to usurp the Commission's function of determining the price line.

2. Permanent Certificates in Contested Proceedings

As we pointed out above, there are no permanent certificates issued after a full hearing for contracts dated after September 28, 1960, other than those here under review.[6] There are, of course, permanent certificates issued after a hearing for contracts dated *prior* to September 28, 1960. As noted in the Intervenors' Statement of Facts (Int. Br. pp. 7-9), the *Skelly, Texaco Seaboard,* and *Hassie Hunt* cases, which determined the in-line price for the contracts dated prior to September 28, 1960, *expressly did not determine the in-line price for the period after September 28, 1960,* and severed the dockets dealing with these later contracts and included them in these proceedings. If these are the "permanent certificates following hearing" to which Intervenors refer (Br. p. 28), then their intention to roll back the prices to a level existing in an earlier time period becomes clear.[7] Indeed, this

[6] Including those pending in Cases 504, 520, 526 and 628.

[7] Intervenors do not refer to other contested permanent certificates issued prior to September 28, 1960, but after a full hearing, in Trunkline Gas Co., 21 FPC 704, at 20¢ in District 3, and in Houston Texas Gas & Oil Corporation, 16 FPC 118, at 17.5¢. Intervenors contend that these prices must be ignored because they were issued under pre-Catco standards; see discussion in Superior's Brief, pp. 16-35.

intention is stated in the footnote on page 26, where they state "we submit that the most appropriate line to be held is the line obtaining in June, 1954, when the Commission first began to exercise its regulatory jurisdiction over producers."

3. The Use of the Statement of General Policy Guideline Prices

The Intervenors and the D.C. Circuit seem to regard the Policy Statement guideline levels as the primary basis for the Commission's decision on the in-line price for the period after September 28, 1960. While the Commission could not "ignore its own Policy Statement," [8] the in-line price for the latter period is not based solely, or even primarily, on the guideline price. The Commission set out to determine,[9] and did determine, *the impact on the industry* of its guideline price levels. It found that these levels had had a stablizing effect on the industry, forcing the producers who were able to make the highest price contracts to reduce their contract prices (often without any action by the Commission) while permitting the lower prices to increase to the guideline levels. It was the *market action which resulted from the Policy Statement,* not the Policy Statement itself, that the Commission looked to in de-

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[8] On this the D. C. Circuit and Tenth Circuit are in agreement; see Sunray decision, I R. 6714,, and Public Service Commission of New York v. F.P.C., 329 F. 2d 242, 247 (D. C. Cir. 1964).

[9] In Skelly Oil Company, 28 FPC 401, 412 (1962), the Commission severed the dockets involving contracts dated after September 28, 1960, for the express purpose of determining the effect of its guidelines prices on subsequent market conditions. A similar procedure was followed in District 3, in Texaco Seaboard, 29 FPC 599 (1963) and in District 2 in Hassie Hunt Trust, 30 FPC 1442-44 (1963).

termining that the in-line price was higher after September 28, 1960.[10]

Moreover, it should be recalled that since the Commission established the in-line prices for pre-September 28, 1960, sales retrospectively by orders issued in *Texaco Seaboard Inc.*, 29 FPC 593 (March 27, 1963), and *Hassie Hunt Trust, Operator,* 30 FPC 1438 (December 9, 1963), there were no in-line prices to which reference could have been made during the interim period. Thus, in contrast to the guideline price levels, in-line price levels could have had no effect upon market conditions or the adequacy of gas supply.

4. The Price Freeze

The Commission Brief (pp. 26-27) correctly points out that ignoring all non-permanent prices would necessarily freeze the price level at the first in-line determination for a given area. The Commission further points out that it was never required, under *Catco* and *Callery,* to ignore market conditions, but (in *Callery*) simply was excused from considering voluminous evidence of these conditions tendered by the producers because of administrative expedience. Therefore, the D.C. Circuit's exclusion of contract prices on the ground that they do reflect current market conditions is in error (Int. Br. pp. 29-30).

Intervenors contend that the producers' right to file for rate increases under Section 4(e) prevents a "freeze" of producer prices (Int. Br. pp. 30-31). Intervenors argue, in effect, that it doesn't matter whether the price line is fixed too low or not, as the producers can collect their contract rates by filing for rate in-

[10] See, *e.g.*, III R. 226, III R. 327, III R. 333, III R. 359.

creases under Section 4(e). As we pointed out in our Initial Brief (pp. 38-40) the producers' right to file rate increases is severely circumscribed by the moratoriums imposed by the Commission in both temporary and permanent certificates.[11] The Commission further has the power, which it customarily exercises, to delay the collection of the increased rate for six months after it is filed.[12] Furthermore, as the Commission notes in footnote 21, page 29, where the Commission requires refunds down to the permanently certificated price levels, there is no way that the producer can retroactively file for rate increases under his contracts.[13] Under these circumstances, should the Commission later find in the Texas Gulf Coast Area Rate Proceeding that the in-line price levels it had fixed were too low, the producer could never recover the money he had been required to refund, or had been precluded

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[11] An example of the effect of the moratorium in temporary certificates can be seen by referring to the Hunt dockets. The same Hunt dockets considered by this Court in F.P.C. v. Hunt, 376 U.S. 515 (1964) in which the moratorium against filing rate increases prior to the issuance of a permanent certificate was sustained, are consolidated in the *Hawkins* case here under review. These sales have been under a moratorium against rate increases since the temporary certificates were issued on April 7, 1961, 25 FPC 654, first under the temporary certificate at the conditioned price level of 18¢, and under the *Hawkins* decision, issuing permanent certificates, the moratorium was continued at the level of 19¢.

[12] The Commission's Regulations [18 CFR 154.94(b)] and Section 4(d) of the Natural Gas Act provide that the increase shall not be effective until 30 days after it is filed. The Commission has the power under Section 4(e) of the Natural Gas Act to suspend the collection of the increased rate for an additional period of five months.

[13] Shell Oil Co v. F.P.C., 334 F. 2d 1002, 1009 (3rd Cir. 1963); F.P.C. v. Tennessee Gas Transmission Co., 371 US 145 (1962).

from collecting under price and moratorium conditions.[14]

5. The Inadequate Gas Supply

The producers sought to introduce evidence of an economic nature tending to prove (1) that higher price levels would create additional incentives, (2) the reserves-production ratio in the Texas Gulf Coast Area has been declining, and (3) evidence showing trends in supply and demand on a national and area basis. This evidence was excluded.[15]

Therefore, the Commission had only the schedules and the testimony of Commission Staff witness and producer witness Gody, which show a steady decline in new gas commitments to the interstate market in District 3. Other evidence also shows that an increasing share of the supply was being appropriated by the intrastate sales.[16] As the Commission states in its brief (FPC Br. 32-37) all of these factors went into the Commission's considered judgment that the price line should not be further reduced.

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[14] As noted at page 38 of our Initial Brief, the in-line levels are below the levels recommended by the witness for the distributors as the just and reasonable rates in the Area Rate Proceeding. In that proceeding the Commission Staff has recommended a rate of 16.8 cents for all sales delivered at a central point under contracts dated after January 1, 1961. Producers recommend a rate of 20 cents for the same period.

[15] Hawkins, III R. 36-37; 516-518; Sinclair, IV R. 46-48. The type of evidence which the producers sought to offer is detailed in Appendix B of the Initial Brief of Sunray DX Oil Company, *et al.* This same type of evidence was made an offer of proof in both Hawkins and Sinclair; see III R. 36-37 and IV R. 94-96.

[16] This evidence was excluded by Examiner but retained as an offer of proof (IV R. 315).

The statement that appears at page 31 of Intervenors' brief, attacking the Commission's failure to find that the earlier in-line price levels had failed to elicit adequate supplies, is particularly ironic in the light of the firm position taken by counsel for Intervenors that no evidence on supply is admissible in a Section 7 certificate proceeding.[17] Such evidence was tendered here and rejected, upon the objection of, among others, counsel for Intervenors. Having objected to the inclusion of evidence tending to prove that gas supplies were inadequate in the Texas Gulf Coast Area, Intervenors cannot now be heard to complain of the absence of findings on that issue, other than the limited findings which the Commission did make, based on evidence in the record, that market conditions had changed.

6. The Commission Properly Concluded That the "Need" Issue Should Be Resolved by Rule-Making or in Pipeline Certificate Cases

In our Initial Brief we showed that the Commission acted reasonably in determining that questions of pipeline and public need for gas should be resolved in pipeline certificate cases or in general rule-making proceedings where all of the relevant information can be readily marshalled. Contrary to the implication at page 23 of Intervenors' Initial Brief, the Commission does not approve producer sales prior to authorization of the necessary pipeline proposal to take the gas. Thus, the Commission expressly found in the *Sinclair* case that the Intervenors' contentions as to take-or-pay were raised "after the certificate of the pipeline purchasers had been authorized" (IV R. 4185). More-

[17] See Counsel's statement in the Hawkins case at III R. 29-30.

over, in the contemporaneous proceedings in *Turnbull & Zoch Drilling Co.*, the Commission emphasized that if producer certificates were issued prior approval to a pipeline project, the producer certificates would be subject to the *caveat* that if the pipeline certificate were denied, the producers would no longer have a market for their gas.[18]

In this context, the Commission's decision to discount the Intervenors' unsupported allegations and determine questions of public need in more appropriate proceedings was a reasonable exercise of its discretion. Bear in mind, as did the Commission in its reference to the "nature of the gas business," that prepayment for gas is not contrary to the public interest. It may indicate a sound decision of pipeline companies to contract for supplies of gas and keep the gas in storage for future use. Since the Commission's general rule in Docket No. R-199 providing extended make-up periods virtually assures that no prepaid gas will be forfeited,[19] the existence of prepayments, even if they could have been traced to the purchasers here involved, can, in no sense, be considered detrimental. In the *United Gas Pipe Line* case, Opinion No. 428, 31 FPC 1180, 1191-1192, referred to by Intervenors (Int. Br. p. 24), the Commission recognized that prepaid gas is an asset like other prepayments.

We submit that the Court of Appeals for the Fifth Circuit was correct when it held upon review of the

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[18] Turnbull & Zoch Drilling Co., 32 FPC 877, 878-879 (1964).

[19] Order No. 334, Docket No. R-199, issued January 18, 1967. See page 61 of our initial brief. See, also, FPC Br. p. 51.

Turnbull & Zoch Opinion No. 478 (*Continental Oil Co. v. F.P.C.*, 378 F.2d 510 at 526):

> "The FPC has been encouraged to devise reasonable means of streamlining its procedures. Federal Power Commission v. Hunt, 376 U.S. 515 at 527, 84 S.Ct. 861, 11 L.Ed 2d 878. The FPC should and does have discretion to consider the question of public need in rule making proceedings or in pipeline certification cases.
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> "Where there are hundreds of producers in § 7 proceedings who cannot have any knowledge of ultimate demand, the result would be either a forced intervention of the pipelines and prolongation of the hearings, or possible collateral attack on the pipeline certificate cases. To force a general consideration of need in § 7 proceedings would force consideration of that type of market evidence whose exclusion *Callery* specifically sanctioned on the price issue."

CONCLUSION

At the core of the in-line price issue is the question whether the determination of the price line is to be made by the Federal Power Commission, as provided by the Natural Gas Act, the Administrative Procedure Act, and prior decisions of this Court, or whether, through excluding all evidence and prices which Intervenors elect to contest, the power to make this determination is to be taken over by Intervenors. A further basic issue is whether the Commission may, even in the limited way followed here, consider current conditions in the industry, and where it finds those conditions require a change, to change the price line accordingly. As the resolution of the just and reasonable rate is a lengthy process, the Commission must have the power to consider changes in the supply situation in a given

area, and fix the in-line price as may be required without awaiting the termination of a rate proceeding, if an adequate supply for consumers is to be assured. The decision of the District of Columbia Circuit, which would deny the Commission this power, should be reversed.

Likewise, the Commission's reasonable exercise of discretion to consider the question of public need in rule-making and pipeline certification cases should be upheld.

Respectfully submitted,

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